Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

-against-

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATOR CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW, ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Respondents.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

v.

BD. OF EDUCATION OF NYC, HAROLD JACOBS, CHAIRMAN Bd. of Ed., ROBERT KIBBEE, Chancellor of City University of N.Y.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented for Review

1) In asserting that their employment by the College was terminated because of differences in philosophy of teaching technique, have petitioners, nontenured teachers, stated a constitutional issue?

2) Where the petitioners have received review of their candidacies for reemployment pursuant to the procedures set forth in the collective bargaining agreement, does the denial of reemploy-

ment at the conclusion of such procedures deprive them of due process?

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Statement of Facts

The essential facts of the case, as described in detail in the Amended Complaint (Appendix C to Petition), are as follows.* Petitioners were non-tenured members of the faculty of the Philosophy Department of Brooklyn College, a unit of the City University of New York. In 1972, the faculty of the Department was divided into two factions, each espousing a different approach to teaching. Petitioners were in the so-called "minority" faction, which preferred the "journal" method over the "lecture" method

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*Respondents moved for dismissal of the complaint under Fed. R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief could be granted. For the purposes of that motion, the allegations of the complaint were deemed by the District Court to be true.

preferred by the so-called "majority" faction.

In May 1973, respondent Kent was elected to the Chairmanship of the Department. He was purportedly backed by the "majority" faction. In addition, respondents Cannavo, Ezorsky, Koslow, and Taylor, all of the "majority" faction, were elected to the Appointments Committee.

In October 1973, petitioners Jones and Korn, among others, were under consideration for reappointment to the faculty; petitioner Massie was under consideration for tenure. The Committee voted to reappoint Korn but not to reappoint Jones. Jones thereupon instituted grievance proceedings under the collective bargaining agreement.

Respondent Kneller, President of the College, granted a de novo hearing of the matter. In December 1973, the College Review Committee upheld the decision of the Philosophy Department's Appointments Committee not to reappoint Jones. In January 1974, respondent Kneller denied the grievance. Jones then initiated a Step II grievance; the administration agreed to remand the Step II hearing to the Step I level, without prejudice.

In February 1974, petitioner Korn informed Department Chairman Kent that he wished to be considered for the position of Assistant Professor and not for a Certificate of Continuous Employment ("CCE"), which permits an individual to continue teaching but does not give such individual

the security of tenure.

In March 1974, Kent requested that petitioner Massie submit his written material in connection with his application for tenure. In May 1974, the Appointments Committee voted to deny Massie tenure.

In June 1974, respondent Kneller reappointed petitioner Jones, stating in his Step I grievance decision that further academic evaluation was warranted. Soon afterward, respondent Cannavo became Acting Chairman of the Department.

In October 1974, petitioner Korn requested that he be considered for a CCE. The Committee voted not to recommend him for the CCE.

In November 1974, respondent Kneller notified petitioner Jones that he (Jones) would not be reappointed; notified petitioner Massie that he (Massie) would be denied tenure; and notified petitioner Korn that he (Korn) would be denied a CCE.

In December 1974, each petitioner initiated a Step I grievance. Hearings were held in March 1975. The grievances were denied in May 1975. Petitioners' last day of work for the college was August 31, 1975.

OPINION OF THE DISTRICT COURT

Judge NEAHER granted respondents' motion for dismissal of the complaint. He concluded that, even viewing the complaint liberally, it was "mani-

fest that the claims of constitutional violation asserted [were] insufficient on their face" (Appendix B to petition at 11a). He stated that petitioners did

> not claim they were denied reappointment for speaking publicly or privately in criticism of college policies. What is so apparent on the face of the complaint is an attempt to draw the court into a stale dispute admittedly between "two factions in the department [who] did have a constant disagreement as to the most appropriate method of teaching certain classes and certain students." (Appendix B to Petition at 11a.)

Judge Neaher found that such a dispute could not give rise to a violation of First Amendment rights, citing Pickering v. Board of Education, 391 U.S. 563 (1968); Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972).

Judge Neaher distinguished a recent decision of this Court, Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 99 S. Ct. 693 (1979), from the instant case in that the teacher in Givhan had "voiced criticism of employment policies and practices which she considered racially discriminatory"; such a situation was "essentially different from the interfactional controversy involved here" (Appendix B to Petition at 11a). Judge Neaher further held that not every claim asserted by a teacher requires an evidentiary hearing on the merits; since "teaching is by definition an expressive activity, every dispute over the best method of classroom instruction would raise First Amendment issues calling for federal court inter-

vention" (quoting from East Hartford Ed. Ass'n v. Board of Education, 562 F. 2d 857 (2d Cir. 1977) (Appendix B to Petition at 12a).

The Court also rejected petitioners' claim that their rights to due process had been violated. He found they had made no assertion that they had a property interest in re-employment nor that they had been deprived of any liberty interest. Judge Neaher also rejected the claim that petitioners had a constitutionally protected property interest in a fair hearing arising, they claimed, from the collective bargaining agreement between the petitioners' union and the Board of Higher Education. Judge Neaher held that acceptance of petitioners'

argument "would open to constitutional litigation a number of claims foreclosed by the decisions in [Board of Regents v. Roth, 408 U.S. 564 (1972)] and [Perry v. Sindermann, 408 U.S. 593 (1972)]", an "anomalous" result since petitioners had "not alleged a deprivation of either property or liberty sufficient to withstand a motion to dismiss" (Appendix B to Petition at 15a).

Judge Neaher also dismissed the conspiracy claim under Section 1983 (3), for failure to allege any class-based invidious discriminatory animus, and the "Monell" claim, against the Board of Higher Education and its officers, since there was not the required showing that petitioners had been dismissed by the College

because of an unconstitutional governmental policy.

Decision of the Court of Appeals

The Court of Appeals affirmed the judgment of the District Court "substantially for the reasons set forth in Judge Neaher's well-reasoned and carefully considered opinion..." (Appendix A to Petition at 2a).

ARGUMENT

THE COURT BELOW CORRECTLY DISMISSED THE COMPLAINT UNDER Fed. R. CIV. P. 12 (b) (6) FOR FAILURE TO STATE A CAUSE OF ACTION, SINCE PLAINTIFFS HAVE ALLEGED NO CONSTITUTIONAL RIGHT DENIED THEM BY RESPONDENTS.

Petitioners state correctly that the threshhold question is whether they are entitled to present evidence in support of their claim that their consti-

tutional rights were violated. Scheuer v. Rhodes, 417 U.S. 232 (1974); Petition at 5-6. That test was properly applied by the District Court, which after a careful review of the allegations in the complaint, dismissed the petition. (Appendix B to Petition at 4a). There must be a prima facie showing initially that petitioners assert rights protected by the constitution. See Fluker v. Alabama State Board of Education, 441 F. 2d 201 (5th Cir. 1971). Only when such rights have been pleaded can the question of respondents' alleged infrigement of those rights be investigated; only then can the courts apply the "balancing of interest formulae enunciated by this Court in Pickering v. Board of Education,

391 U.S. 563 (1968); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) and Givhan v. Western Line Consol. School District, [439 U.S. 410 (1979)]" (Petition at 5).

As petitioners themselves acknowledge, the basis of the suit is whether an intradepartmental debate "as to the best way to teach educationally disparate students in an open-admissions program of a publicly-supported university is constitutionally protected activity" (Petition at 6).

The Court of Appeals for the Second Circuit has held that the "mere" assertion "that one teaching technique is to be preferred over another . . . has no more to do with a constitutional

interest than would be a claim that closer 'rapport' could be achieved by arranging students' desks in a circle rather than in rows." East Hartford Ed. Ass'n v. Board of Education, 562 F. 2d 856, 857 (2d Cir. 1977). The Court went on to state that its

> role is not to choose the better educational policy. We may intervene in the decisions of school authorities only when it has been shown that they have strayed outside the area committed to their discretion. If [the teacher's] argument were to prevail, this policy would be completely eroded. Because teaching is by definition an expressive activity, virtually every decision made by school authorities would raise First Amendment issues for federal court intervention.

East Hartford, supra, 562 F. 2d at 859.

Thus, even if true, the claim that the sole reason plaintiffs did not

receive the appointments to which they believe they were entitled was their preference for one teaching method over another clearly does not raise a constitutional issue. Indeed, the question of faculty appointments itself is not per se of constitutional dimension. To the contrary, in Faro v. New York University, 502 F. 2d 1229, 1231-1232 (2d Cir. 1974), the Court of Appeals held that "of all fields, which the federal courts should hesitate to take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."

Petitioners urge that the ruling in Eichman v. Indiana State Univ. Bd. of Trustees, 597 F. 2d 1104 (7th

Cir. 1979) supports their contention that their First Amendment rights were violated. As petitioners note, however, the plaintiff in Eichman had circulated memoranda critical of the University's practices and policies. It was these memoranda which provided the basis of the free speech claim. The Court found that the memoranda themselves constituted a constitutionally protected exercise of free speech; thus, the First Amendment claim could not be dismissed summarily; the Court went on to hold that, at trial, the University would be entitled to attempt to prove that plaintiff had not been rehired "because 'he was unwilling to accept and work within the reality dictated by budget restrictions and student enrollment'"; the Court implied

that such unwillingness would be deemed a permissible reason for non-renewal. Eichman, supra, at 1108, 1109.

In the instant case, petitioners do not allude to any particular statement or writing as the basis for their non-retention by the College. Rather, they insist they were not retained because of their views on teaching technique. This difference in approach is more nearly akin to Eichman's "unwillingness to work within reality" than it is to Eichman's critical memoranda.

This distinction is an important one. While petitioners may have a right to free speech, the College has a responsibility to operate the school in the manner it deems best, including

the determination of those faculty members it deems best able to effect school policy. See LaBorde v. Franklin Parish School Board, 510 F.2d 590 (5th Cir. 1975) (summary judgment granted). If advocacy of a particular teaching method were absolutely protected simply because it is in the form of speech, then the College would not be able to build around a faculty of its choosing. The College could not function at all if faculty members could obtain a sinecure simply by virtue of publicly expressing contrary views on academic policy within their department and the College. As noted by the District Court in the instant case, if the law were

otherwise (12a): "the door would be opened for countless appeals to federal judges to act as mediators in academic disputes - a task this court considers itself particularly unadapted to perform." Petitioners' real quarrel is that they believe the wrong choice was made. That is not a proper basis for action in the courts. See Webster v. Redmond, 599 F. 2d 793 (7th Cir. 1979).

(2)

Petitioners also claim that they were wrongfully terminated from their employment without due process of law. As the District Court noted, petitioners have made no showing that they have been deprived of any property interest as

non-tenured faculty members. Petitioners nonetheless claim that the provisions of the collective bargaining agreement between their union and the Board of Higher Education provide a property interest susceptible of protection by the Fourteenth Amendment guarantee of due process. This position is without merit. A procedure for review set forth in a contract is not in itself a property interest in the constitutional sense. "In order to constitute a property right, one must have a current valid expectation, based on the Government's implied promise to continue an entitlement, in an important, personal, monetizable interest." Cervoni v. Secretary of

Health, Education, and Welfare, 581 F. 2d 1010, 1018 (1st Cir. 1978) (emphasis added). It is this sort of interest which may not be removed without "due process"; the process due in a given case is intended to protect a particular predicate property right. In the instant case, however, there is no such right; petitioners have no constitutionally protected property right in retaining their positions on the faculty. The review procedures of the collective bargaining agreement may have been designed to afford some protection to non-tenured teachers, but it does not create property rights in the teaching positions. It is not disputed that petitioners did receive the review to which they were entitled under the collective

bargaining agreement between the petitioners' union and the Board of Higher Education. The fact that the contract may set out pre-termination procedures does not imply that petitioners thereby had property rights in the positions, such that "due process" principles apply.

Petitioners in fact do not claim that the procedure creates a property right in the positions. Rather, they claim, in effect, that the procedure per se is a property right in the constitutional sense and, therefore, that they cannot be deprived of the procedure without "due process." This is simply not so. The contractual procedure is not a substantive right; it is a procedure. If the petitioners are not satisfied with the results of the

procedure, the appropriate remedy is a proceeding in the state courts challenging the denial of the tenure on the grounds of arbitrariness or capriciousness. See Matter of Agoglia v. Mulrooney, 259 N.Y. 462, 182 N.E. 84 (1932).

Conclusion

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

September 11, 1980.

Respectfully submitted,

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